

GAHC030000662023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/2/2023

Sh. Lalkamlova
S/o Laichhingpuia (L)
R/o Tlangnuam Presently detained at Central Jail, Aizawl.

VERSUS

The State of Mizoram
Aizawl.

Advocate for the Petitioner : Mr C Lalfakzuala (Amicus Curiae)

Advocate for the Respondent : Mr C Zoramchhana, PP, Mizoram

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGMENT & ORDER (CAV)

Date : 13-09-2023

(Michael Zothankhuma, J)

Heard Mr. C. Lalfakzuala, learned Amicus Curiae and Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, Mizoram.

2. This appeal has been filed challenging the Judgment and Order dated 27.10.2022 passed by the Fast Track Special Court, POCSO Act, Aizawl in SC No. 35/2021 (Criminal Trial No. 590/2021), by which the appellant has been convicted under Section 6 of the POCSO Act, 2012 and sentenced to undergo Rigorous Imprisonment for 20 years with a fine of Rs. 10,000/-, in default, Rigorous Imprisonment for a further period of 3 months.

3. The prosecution case in brief is that an FIR dated 27.01.2021 was submitted by Prosecution Witness No. 1 (PW-1) to the Officer-in-Charge, All Women Police Station, Aizawl stating that her daughter had been sexually molested by their neighbour, Sh. Lalkamlova (appellant) at the appellant's and the victim's residence, during the period from December, 2020 to 25.01.2021. Pursuant to the FIR, AW.PS Case No.1/2021 under Section 6 of the POCSO Act read with Section 376 AB IPC was registered on 27.01.2021. After investigation of the case, the I.O submitted a chargesheet, on finding a prima facie case against the appellant under Section 6 of the POCSO Act read with Section 376 AB IPC.

4. The learned Trial Court thereafter framed charges under Section 6 of the POCSO Act, read with Section 376 AB IPC against the appellant, which was denied by the appellant and claimed trial. During the trial proceedings, 8 prosecution witnesses and 1 defence witness were examined by the learned Trial Court. During examination of the appellant under Section 313 Cr.PC, the appellant denied the evidence that had been adduced against him. The learned Trial Court thereafter came to a finding that the appellant was guilty of having committing the offence of aggravated penetrative sexual assault on the victim.

The appellant was convicted under Section 6 of the POCSO Act, 2012 and sentenced accordingly, as stated in the foregoing paragraphs.

5. The learned Amicus Curiae has taken us through the evidence produced by the prosecution witnesses and has stated that there is nothing to show that the learned Trial Court was satisfied that the minor witnesses, i.e. the prosecutrix (PW No. 2), her cousin PW No. 3 and PW No. 4 (the youngest sister of the prosecutrix), were in a position to give rational answers and had understood the questions put forth to them by the learned Trial Court. He thus submits that the conviction of the appellant on the basis of the evidence of minor witnesses was not sustainable.

6. The learned Amicus Curiae submits that the statement of the victim was to have been recorded in her residence or in a place where the victim usually resides. However, in the present case, the statement of the victim had been recorded in the Police Station, which was not in consonance with Section 24 of the POCSO Act, 2012. The learned Amicus Curiae also submits that there is a possibility of the prosecutrix having been tutored to implicate the appellant in the false case. He also submits that the prosecutrix, in her testimony given before the Court during trial, did not state that the appellant had inserted his private parts into her private parts. However, the statement of the prosecutrix under Section 164 Cr.PC had clearly stated that the appellant had inserted his private parts into the victim's private parts. He submits that in view of the discrepancy in the statement of the victim under Section 164 Cr.PC vis-a-vis the testimony given during trial, the same gives rise to an inference that the prosecutrix was not a reliable witness and also not capable of giving a truthful

testimony. He also submits that when there are two views possible on the evidence recorded, the view favourable to the accused should be accepted by the Court.

In support of his submission that it is the duty of the learned Trial Court to satisfy itself as to whether the child is capable of giving a rational answer, after understanding the questions put to her, he has relied upon the Judgment of the Apex Court in the case of *K. Venkateshwarlu Vs. State of Andhra Pradesh* reported in (2012) 8 SCC 73.

7. The learned Amicus Curiae has also referred to the Medical Report made by PW-8, wherein it has been stated that the black trouser of the appellant had been taken and sent to the Pathology Laboratory for a report on the same. He submits that there being no final report made by the Pathology Department with regard to the black trouser, there is no proof that the appellant had any sexual intercourse with the victim. He submits that in terms of Section 53-A(2)(iv) CrPC, the DNA profiling of the clothes of the accused appellant had to be done, so as to prove that the appellant had sexually assaulted the victim girl. He submits that the absence of the Pathological Department report was fatal to the case of the prosecution and in this regard, that learned Amicus Curiae has relied upon the case of *Krishan Kumar Malik Vs. State of Haryana*, reported in (2011) 7 SCC 130.

8. He has also relied upon the Judgment of the Supreme Court in the case of *Sadashiv Ramrao Hadbe Vs. State of Maharashtra and Another*, reported in (2006) 10 SCC 92, in support of his submission that when there are many

discrepancies and contradictions in the testimony of the prosecution witnesses, the learned Trial Court has no other option but to acquit the appellant of the offence of having committed aggravated penetrative sexual assault on the victim girl. The learned Amicus Curiae has also relied upon the Judgment of the Apex Court in the case of *Yogesh Singh Vs. Mahabeer Singh and Others* reported in (2017) 11 SCC 195, in support of his submission that the evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law.

9. Though the learned Amicus Curiae had tried to bring in a new fact during the hearing of this appeal with regard to Disability Certificate and Unique Disability ID Card issued on 11.05.2022 by the Civil Hospital, Aizawl, showing that the appellant was suffering 50% mental illness or disability, the learned Amicus Curiae submits that he does not wish to press this issue, inasmuch as, the issue of mental illness or disability of the appellant was only with effect from 11.05.2022, while the FIR had been submitted on 27.01.2021.

10. The learned Amicus Curiae thus prays that the appellant should be acquitted of the charge/crime, as the prosecution had not been able to prove the guilt of the accused beyond all reasonable doubt.

11. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, on the other hand, submits that the prosecution had been able to prove the guilt of the accused beyond all reasonable doubt. She submits that the learned Trial Court did not err in convicting and sentencing the appellant under Section 6 of the POCSO Act, as the evidence of the prosecutrix inspired the confidence of the

Court and in terms of the various Judgments of the Apex Court, it can be the sole basis for convicting an accused person. She also submits that the evidence of the prosecutrix had been corroborated by PW No. 3 and PW No. 4, who are the cousin and younger sister of the prosecutrix respectively.

12. The learned Addl. Public Prosecutor also submits that the recording of the statement of the prosecutrix in the Police Station, which is not in consonance with Section 4 of the POCSO Act, 2012, did not cause any prejudice to the appellant. As such, the same did not vitiate the prosecution case. She also submits that the mother of the victim girl was a divorcee, who sold vegetables all day in the streets of Aizawl city. Hence, the children were left alone in the house during the day, which the appellant had taken advantage of. She submits that in terms of the Judgment of the Apex Court in the case of *K. Venkateshwarlu Vs. State of Andhra Pradesh*, reported in (2012) 8 SCC 73 para 9, the learned Trial Court can convict an accused for the offence of aggravated penetrative sexual assault, solely on the evidence given by the prosecutrix. She submits that as there is no infirmity with the impugned Judgment and Order, the same should not be interfered with.

13. We have heard the learned counsels for the parties.

14. In the present case, PW-1, who is the mother of the victim submitted the FIR on 27.01.2021, stating that the appellant had molested her daughter from December, 2020 to 25.01.2021, by having sexual intercourse with her and inserting his fingers inside her daughter's (victim's) private parts many times. The evidence given by PW-1 is that her daughter was born on 14.09.2011 and

that she had been living with her two children since her divorce in the year 2016. The appellant used to drop into their house. PW-1 spent her day selling vegetables from house to house as she was the only bread earner. One day, her daughter (victim) told her that she wanted to tell her something, but was hesitant to say it. Cecilia Zodinmuani (PW-3), who is the cousin of the victim and was around 8 years old, on knowing what was being asked by PW-1, Cecilia Zodinmuani (PW-3) disclosed the incident between the appellant and the victim to PW-1. PW-1 was heart broken and asked her daughter the facts. Thereafter, the victim told PW-1 that the appellant had sexually assaulted her many times and the victim had been afraid to tell PW-1 about the same. The victim (PW-2) told PW-1 that she did not disclose the incident to her mother, as the appellant had told her that he would be put in Jail for about 10 years if the victim told anybody about it and that PW-2 was afraid to be taken to Court. PW-1 stated that she came to know about the incident on 27.01.2021, wherein she approached the Non-Government Organisation (YMA) and thereafter lodged an FIR in the Police Station. The Birth Certificate of her daughter was seized by the Police and a photo copy was made. Her daughter was medically examined at Civil Hospital, Aizawl and her statement was recorded by a lady in the Police Station.

In her cross examination, PW-1 stated that she personally checked the private parts of her daughter (PW-2) and she did not find any injury from the outside.

15. The evidence of the victim, PW-2, is that she knew the appellant as his house was below their house. The appellant used to come to their house while

her mother was cooking and that her parents had divorced. When PW-2 used to play marbles with her friends, the appellant used to watch. When the others had gone home, the appellant used to call her separately into his house and into his bedroom. There he used to touch her breast and put his hand inside her underwear and touch her private parts. He also poked his finger inside her private parts, due to which, she felt pain. He did this many times and though Cecilia Zodinmuani (PW-3) came to know about it, the victim told PW-3 not to disclose the incident. PW-2 also stated that the appellant told her not to disclose the matter to anyone or he would be sent to Jail for 10 years and that PW-2 would have to go to Court where many Police personnel were there. Thus, PW-2 was scared to disclose the incident to her mother. The appellant did not stop the sexual assault made upon her. She told her mother that though she could not recollect the exact date and month when the appellant had sexually assaulted her, it was between 2019 and 2020. PW-2 stated that she told her mother about the incident in the year 2021. She went to the Police Station with her mother and one lady in the Police Station recorded her statement. She was then taken to the Doctor for medical examination.

16. The evidence of PW-3, who was around 8 years at the time of the incident, is the cousin sister of the victim PW-2. Her evidence is to the effect that the appellant was residing in a neighbouring house. She stated that the victim was one year older than her. She stated that though she did not recall the exact date, the victim's mother had asked her and the victim to buy goods from a nearby shop. On the way the victim entered the house of the appellant and she was asked to wait for her in the ground level, below the residence of the appellant. She stayed on the ground level below the bedroom of the appellant

where there was a hole on the floor of the bedroom. On peeping inside, she saw the victim lying on the bed of the appellant holding a mobile phone and she saw the appellant on top of the victim. She then saw the appellant shaking on top of the victim. The victim thereafter came out from the appellant residence and called for her (PW-3). They then headed for the shop. The next day PW-2 and PW-3 again went to the residence of the appellant and PW-2 again asked her to wait on the ground level, below the residence of the appellant. PW-3 again peeped through the hole of the floor and saw the appellant pulling down the pants of the victim up to her ankle. PW-3 saw the appellant pulling down his trouser up to his knees and saw the victim's legs on the floor and her body lying on the bed with the appellant on top of the victim. On hearing the sound of the floor under the bed, she took her eyes away from the peephole and moved away. Thereafter, the victim came out of the house and called her and they went home. On another occasion, the victim's mother asked PW-3 and the victim to do some errand at the nearby shop and on the way back, the victim again went to the appellant's house. PW-3 again stayed in the same spot and heard noises from the same bedroom. Thereafter the victim came out and they went home. PW-3 told the victim that she had seen them through the peephole, whereupon the victim told her that they used to have sex and also below the cross fixed near his residence. PW-3 stated that she told the victim to tell PW-1, but the victim refused as she was afraid. However, the younger sister (PW-4) of the victim told PW-1 about the sexual activity between the victim and the appellant. PW-3 also stated that on being asked by PW-1, she narrated everything that she had seen and heard.

17. The evidence of PW-4, who is the younger sister of the victim, is to the

effect that she turned 8 in April, 2022. PW-4 stated that her cousin sister PW-3, who used to live with them, told her about the victim and the accused having a sexual relationship, but she was not allowed to tell anything to her mother about it. However, one particular morning, when her mother asked her, she told everything to her mother with regard to what PW-3 had told her. PW-4 also stated that the appellant used to give money to PW-2 (victim). Once when PW-2, PW-3 and PW-4 went near the cross fixed not far from their house, the appellant also came to the said area to look for his snare, (trap). Thereafter, the victim PW-2 told PW-3 and PW-4 to stay at the nearby hut. The victim went towards the appellant. As the victim took a long time in coming back, PW-3 and PW-4 went towards them and on approaching them, PW-4 saw the appellant pulling up his pants and fixing his belt.

18. The evidence of PW-5, who is one of the neighbors of the victim and her family is to the effect that he was the seizure witness to the seizure of the victim's birth certificate by the Police.

19. The evidence of PW-6, who is an Executive Committee Member in the Tlangnuam Vengthar Young Mizo Association (YMA) Branch, Aizawl, is to the effect that he accompanied PW-1 and the children, including the victim, to the Police Station. He was also the seizure witness to the seizure of the victim's birth certificate.

20. The evidence of PW-8, who was the Doctor who examined the victim on 27.01.2021 at 11.20 am, is to the effect that the appellant told him that he used to fondle the breasts and genitalia of the victim. He also examined the

appellant and that he had taken a smear from the penis of the appellant and sent it to the Pathology Department, Civil Hospital, Aizawl for a report. However, no report was furnished by the Pathology Department.

In his cross examination, PW-8 stated that he had examined only the appellant and no other person.

21. The evidence of PW-12 (I.O) is to the effect that he knew the appellant who was present in the Court. He stated that an FIR was submitted on 27.01.2021 by PW-1, with regard to the sexual assault made by the appellant on PW-2. During investigation, he visited the place of occurrence and drew a sketch map of the same. He examined PW-1 and all the other witnesses. The victim's original Birth Certificate was produced by the PW-1 and a copy of the same was made. The victim was also sent for medical examination and her medical examination report was exhibited as Exhibit P-7. The victim was also sent to the Magistrate for taking her judicial statement. He also exhibited the medical examination report of the victim as Exbt-P-7.

22. The evidence of defence witness No. 1 (DW-1) is to the effect that he stayed in the appellant's residence from 15.12.2020 till 26.01.2021 and he did not see any untoward incident happening in the appellant's residence. He also stated that the victim's family would come to the residence of the appellant to share his water supply. Further, the children of PW-1 would often come to the residence of the appellant and play games installed in the appellant's mobile phone.

23. The statement of the victim (PW-2) made under Section 164 Cr.P.C before the Judicial Magistrate 1st Class, Aizawl on 15.02.2021 is similar to her testimony given by her before the learned Trial Court, except for one small difference. In the statement made before the Judicial Magistrate, the victim had stated that the appellant would take out his private parts and try to insert it into her private parts and that he even successfully inserted it inside her private parts on one occasion. On the other hand, in her testimony before the learned Trial Court, PW-2 does not say that the appellant had tried to insert his private parts into her private parts or that he had successfully inserted it inside her private parts on one occasion.

If the victim or the I.O had been confronted with the above discrepancy, it might have been unsafe to rely on the victim's evidence. However, there is evidence to prove that the appellant had fondled the breast of the victim and inserted his finger in the private parts of the victim, who was below 12 years of age. Exbt.P-7, which is the medical examination report of the victim (PW-2), is to the effect that the rupture to the victim's hymen was old. The evidence of PW-3 implies that the appellant had sexual intercourse with the victim. Interestingly, the Doctor, who conducted the medical examination of the victim (PW-2) has not adduced evidence before the learned Trial Court and as such, has not proved the contents of the medical examination report of the victim. However, the correctness of the medical examination report of the victim has not been disputed by the learned Amicus Curiae. Also, in the case of *State of M.P Vs. Dayal Sahu*, reported in (2005) 8 SCC 122, the Supreme Court has held that non-examination of the Doctor and non-production of the Doctor's report would not be fatal to the prosecution case, if the statement of the

prosecutrix and other prosecution witnesses inspired confidence.

24. In the case of *K. Venkateshwarlu (Supra)* and *Pradeep Vs. State of Haryana (Supra)*, the Hon'ble Supreme Court has held that the learned Trial Court is to satisfy itself as to whether a child is capable of giving rational answers, after understanding the questions put to her. The Supreme Court further held that before recording the evidence of a minor, the Judicial Officer has to ask preliminary questions to the minor, to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. In this case, we find that the learned Trial Court Judge had not put any preliminary questions to the victim (PW-2) or the minor child witnesses PW-3 and PW-4, to ascertain whether the PW-2, PW-3 and PW-4 were able to understand the questions put to them and respond to them in a rational manner.

25. In view of the above fact, this Court had called PW-2, PW-3 & PW-4 for taking additional evidence in terms of Section 391 Cr.P.C and questions were put to them on 07.09.2023 in the presence of the learned Amicus Curiae and the Additional Public Prosecutor. On hearing the answers given by PW-2, PW-3 and PW-4 to the questions put to them on 07.09.2023, we are satisfied that PW-2, PW-3 and PW-4 were able to understand the questions put to them and were able to give rational answers at the time of recording of the evidence which was done in the year 2022. The recording of the preliminary questions put to PW No. 2, PW No. 3 and PW No. 4 and their answers to the same on 07.09.2023 have been exhibited as Exb- 10, 11 & 12 respectively.

26. In the case of *K. Venkateshwarlu Vs. State of Andhra Pradesh(Supra)* and in the case of *Yogesh Singh Vs. Mahabeer Singh(Supra)*, the Supreme Court has held that the evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the Court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers. A child witness, by reason of his tender age, is a pliable witness and can be subjected to tutoring. Thus, the Court must be satisfied that the child was not acting under the influence of someone and that the evidence tendered was not tutored and had a ring of truth. The Supreme Court further held that practical reasoning required that the evidence of a child witness must find adequate corroboration. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable.

27. As held by the Hon'ble Supreme Court, the evidence of minor witnesses are required to be closely scrutinized. In this case, the evidence of the victim PW-2 clearly shows that the appellant had used his fingers to penetrate the private parts of the victim girl and as such, had committed an offence of penetrative sexual assault, as defined in Section 3 of the POCSO Act, 2012. As the victim PW-2 was below 12 years of age at the time of incident, the appellant has committed the offence of aggravated penetrative sexual assault. The evidence of PW-3, who had seen the appellant lying on top of the victim through a peephole, also corroborates the evidence of PW-2 that the appellant had sexually assaulted the victim. As stated earlier, the hymen of the victim had been found to be ruptured.

28. With regard to the stand taken by the learned Amicus Curiae that no

Pathological Department report was made with regard to the trouser of the appellant which had been sent for DNA profiling/examination, we are of the view that no purpose would have been served even if a Pathological Department report on the appellant's trouser had been made, inasmuch as, no clothes of the victim girl was sent to the Pathological Department for DNA profiling to make a match of something that might have been found in the appellant's trouser with the clothes worn by the victim girl. Further, there is nothing to show that any spermatozoa or secretion made by the appellant, was found on the body or clothes of the victim. As such, the case of *Krishan Kumar Malik (Supra)*, which pertains to the question of DNA profiling in terms of Section 53 A(2)(iv) Cr.P.C is not applicable to the facts of this case.

29. In the case of *Sadashiv Ramrao Hadbe (Supra)*, the Supreme Court held that an accused can be convicted on the sole testimony of a prosecutrix in a rape case, if it is capable of inspiring confidence in the mind of the Court.

30. In the case of *Narender Kumar Vs. State (NCT of Delhi)*, reported in *(2012) 7 SCC 171*, the Supreme Court has held that it is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the Court as such, such conviction can be based only on the solitary evidence of the prosecutrix. No corroboration would be required unless there are compelling reasons which necessitate corroboration of a statement. Corroboration of the testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law, but a guidance of prudence. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

31. In the case of *Yogesh Singh Vs. Mahabeer Singh (Supra)*, the Supreme Court again stated that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. It is only serious contradictions and omissions which materially affect the case of the prosecution, but not every contradiction or omission.

32. On examination of PW Nos. 2, 3 & 4 on 07.09.2023, we are satisfied that they could give rational answers after understanding the questions put to them. We also find that the testimony of the victim girl inspires the confidence of this Court and as such, we do not find anything to doubt the veracity of the testimony of PW-2. We also find that there is nothing to the effect that there was any enmity between the family of the victim and the appellant, to have provided a reason for the victim to have falsely accused the appellant of the crime. Also, we are of the view that prosecutrix and the minor witnesses have not been tutored, with regard to their testimony given before the learned Trial Court.

33. In view of the reasons stated above, we do not find any ground to interfere with the impugned Judgment & Order dated 27.10.2022 passed by the learned Trial Court.

34. The appeal is accordingly dismissed. Send back the LCR.

35. We appreciate the submission made by the learned Amicus Curiae that he will not be accepting any fees in this case, as it is the first case disposed of

by the Division Bench in this newly inaugurated building of the Gauhati High Court, Aizawl Bench.

JUDGE

JUDGE

Comparing Assistant